No. 300

In the

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1969

James Tooahimpah Tate,
Vila Tooahnippah (Paddlety),
Julia Tooahnippah (Goombi),
and James Tooahimpah Tate,
the duly qualified and acting
Administrator of the Estate
of Frankie Lee Tooahnippah,
deceased,
*Petitioners,*

VERSUS

Walter J. Hickel, Secretary of
the Interior for the United
States, and Dorita High Horse,
*Respondents.*

## REPLY BRIEF OF PETITIONERS

Omer Luellen
P.O. Box 96
First State Bank Bldg.
Hinton, Oklahoma 73047

*Counsel for Petitioners*

January, 1970

PETITION FOR CERTIORARI FILED JUNE 28, 1969
CERTIORARI GRANTED OCTOBER 13, 1969

INDEX

CITATIONS

Cases:

Statutes:



Miscellaneous:

In the
SUPREME COURT OF THE UNITED STATES

---

October Term, 1969

---

JAMES TOOAHIMPAH TATE, et al.,
Petitioners

v.

WALTER J. HICKEL, et al.,
Respondents

---

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

---

# REPLY BRIEF OF PETITIONERS

---

January, 1970

## REPLY OF PETITIONERS TO STATEMENT OF CASE OF RESPONDENT, DORITA HIGH HORSE, IN HER ANSWER BRIEF OF DECEMBER, 1969.

In the statement of the Case found in the Answer Brief of Dorita High Horse, Respondent, Page 7, there appears the following paragraph:

> "It will be noted in passing that much of Petitioners' statement of the case is argumentative and inappropriate to that section of their brief. Respondent objects strenuously to the constant characterization of her as being an illegitimate, as she is legitimate by the very terms of Title 23 U.S. 371."

Your Petitioners believe that their Statement of the Case as set out in their Brief of November, 1969, was a factual and correct statement. Apparently, Dorita High Horse is concerned by the statement in the Brief of your Petitioners that she was the illegitimate daughter of George Chahsenah. The Secretary of the Interior on Appeal, acting by and through the Regional Solicitor, said that the decedent, George Chahsenah, was the natural father of Dorita High Horse and the Examiner of Inheritance found that George Chahsenah had never been married but that even though the evidence was conflicting, Dorita High Horse was found to be the daughter of the decedent, George Chahsenah, and entitled to inherit as the sole heir at law if the decedent had died intestate. The Circuit Court of Appeals for the Tenth Circuit (Joint App. 45-46) stated as follows:

"The basic facts are without dispute. One George Chahsenah, a Comanche Indian, died, leaving a will dated March 4, 1963, and by this instrument left all of his estate consisting of Indian Trust property to his niece and her three children, who are the appellees in both appeals.[1] Pursuant to 25 U.S.C. § § 372 and 373, after hearings, a Department of Interior Examiner of Inheritance approved the will and ordered distribution of the estate accordingly. Appellant, Dorita High Horse, the natural daughter of the testator, contested the will before the Examiner and appealed the decision to the Secretary of the Interior." (Footnote deleted).

Your Petitioners further state that the following definition for a natural child is found in Black's Law Dictionary, Second Edition, published by the West Publishing Company at Page 197:

"NATURAL CHILD. A bastard; a child born out of lawful wedlock. But in a statute declaring that adopted shall have all the rights of 'natural' children, the word 'natural' was used in the sense of 'legitimate.' Barns v. Allen, 9 Am. Law Reg. (O.S.) 747. In Louisiana. Illegitimate children who have been adopted by the father. Civ. Code La. art. 220. In the civil law. A child by natural relation or procreation; a child by birth as distinguished from a child by adoption. Inst. 1, 11, pr.; Id. 3, 1, 2; Id. 3, 8, pr. A child by concubinage, in contradistinction to a child by marriage. Cod. 5,27."

Judge Eubanks, the Trial Court Judge, apparently had considerable doubt as to the validity of the finding by the Secretary of the Interior acting by and through the Regional Solicitor, and the Examiner of Inheritance that George Chahsenah was the father of Dorita High Horse as he so cogently set out in footnote 6 of his Opinion (Joint App. 32-33):

> "This court has not found the evidence of the decedent's paternity nearly as convincing as did the hearing examiner and the Regional Solicitor. The evidence in that regard which is contained in the administrative record is conflicting and, in my view, could have supported a finding to the contrary. I am intrigued by the singular fact that the mother of this putative daughter, Mary High, must have suffered from an equal lack of conviction of the decedent's paternity, as evidenced by her actions at the time of Dorita High Horse's birth. She attributed paternity to a different individual, and that individual is named as the father in the birth certificate which was prepared at the time. The only telling evidence in support of the finding is a skillfully typewritten letter, dated August 31, 1949, and obviously not prepared by the decedent, which is addressed to the Oklahoma Bureau of Vital Statistics and which is purported to be signed by the decedent, wherein it is stated that Dorita High is his daughter and that he was 'perfectly willing for her to use /his/ name as her name on her birth certificate or in school.' The record would seem to indicate that, until she acquired the surname 'Horse' as a result of her present marriage, she went by the surname of her mother."

Your Petitioners further note that in the Statement of the Case in the Answer Brief of Dorita High Horse, considerable emphasis is again placed upon the addiction of George Chahsenah to the use of alcohol during his life time. As previously stated in the November, 1969, Brief of your Petitioners, one of the principal reasons for contesting the Will of George Chahsenah was an attempt on the part of the contestants to prove that George Chahsenah was an alcoholic and was never sober enough to make a valid Will for several years prior to his death. The contest of the Will of George Chahsenah was disallowed and the Secretary of the Interior acting by and through the Regional Solicitor and the Examiner of Inheritance both held that the factum of the Will was proper and met all technical requirements, but the Secretary of the Interior acting through the Regional Solicitor on appeal would not approve the Will of George Chahsenah because he stated that the decedent did not achieve by the execution of his Will, a just and equitable treatment of his heirs at law, and particularly Dorita High Horse, his natural daughter.

REPLY OF PETITIONERS TO ARGUMENT PART I STYLED "THE LEGISLATIVE HISTORY AND PREVIOUS DECISIONS OF THIS COURT ARE CONSISTENT WITH THE HOLDING THAT THE SECRETARY'S ACTION IS NOT SUBJECT TO REVIEW BY THE COURTS" OF RESPONDENT, DORITA HIGH HORSE, IN HER ANSWER BRIEF OF DECEMBER, 1969.

In the Answer Brief of Dorita High Horse of December, 1969, Pages 11, 12, and 13, there appears a discourse found in 45 Cong. Rec. 5812 between Mr. Burke, the Chairman of the Indian Affairs Committee at that time, and certain other members of Congress, which discourse took place shortly prior to the passage of the Act of June 25, 1910. Your Petitioners are of the

opinion that consideration should be given to the temporal depth of the statements contained in the legislative history as set out in the discourse between Congressman Burke and the other Congressmen. It must have been the opinion of Congressman Burke, approximately sixty (60) years ago, that the Secretary of the Interior would exercise strict control of the contents of Wills made by Indian testators, but this was not the interpretation placed on Section 2 of the Act of June 25, 1910, by the Secretary of the Interior. Your Petitioners particularly refer to a portion of the Memorandum of May 10, 1941, addressed to the Assistant Secretary of the Interior (Nov. 1969 Brief of Petitioners, App. B, B-2, and B-3):

> "The record shows that the testator was of sound and disposing mind at the time of the execution of his will. No evidence whatever of fraud, duress, undue influence or other imposition is contained in the record. The testator devised certain inherited interests having a value of about $900 to Louie J. Grende, a white man. Specific devises were also made to Matilda Fleet, a Spokane Indian, and Maud Jennings, half-sister and closest living relative of the testator who is also made sole residuary devisee and legatee. In a written statement made contemporaneously with the will, the testator was careful to explain his reasons for these dispositions. According to that statement the devise to Grende was made because Grende had provided him with a home and had taken good care of him. The devise to Matilda Fleet was made because the subject of the devise was the allotment of Matilda's father and Matilda already had an interest in it. The devise to Maude was made be-

cause he wanted her to have all of his inherited interest on the Coeur d'Alene Reservation. If the will be disapproved, all of these stated desires of the testator will be defeated. Matilda who is not a heir will take nothing. Grende, the white man, would likewise take nothing as an heir but in recognition of services rendered to him by the decedent it is proposed to allow a claim in his behalf against the estate in the amount of $600. Maud, while an heir, would have to share the land interests intended to be given her with others. Finally, five people not intended to be objects of the testator's bounty would be given a one-tenth interest each in the entire estate.

The act of June 25, 1910 (36 Stat. 856), as amended, declares that any person having restricted lands or other restricted or trust property, 'shall have the right *** to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior' with the proviso that no such will shall have any validity unless approved by the Secretary. The right to make a will is thus conferred on the Indian not on the Secretary. Whatever discretion the Secretary may have in the matter of approving or disapproving the will, it is clear that this discretion should not be exercised to the extent of substituting his will for that of the testator. Such would clearly be the effect of disapproval in the present case. The naming of a non-Indian as one of the beneficiaries obviously is not a valid objection to approval of the will in the absence of fraud or other

imposition, which clearly is not present. (Emphasis added).

I recommend that the will be approved."

Your Petitioners note that at the bottom of Page 15 in the Answer Brief of Dorita High Horse, there appears the statement that jurisdiction was vested in the Courts for the approval of Indian Wills prior to the Act of June 25, 1910. Your Petitioners believe that this statement is in error because it is your Petitioners understanding that Indians receiving allotments under the General Allotment Act of 1887 had no authority or Statute authorizing Indians of this class the right to execute Wills bequeathing and devising their trust property and lands prior to the Act of June 25, 1910, by which Section 2 of said Act did then give the Indians the right to execute Wills. Consequently, it was incorrect for Dorita High Horse to say that jurisdiction to approve the Will of an Indian testator was taken from the Courts and given to the Secretary of the Interior by the Act of June 25, 1910, because the Indian testator had no right of any kind relative to his trust properties to make a Will prior to June 25, 1910.

Your Petitioners further state that Blanset v. Cardin, 256 U.S. 319 (1921) was quoted with approval in the Answer Brief of Dorita High Horse at Pages 14 and 15 in said Brief. Your Petitioners agree with this authority, but nevertheless, they would like to call to the attention of the Court that the quotation from Blanset v. Cardin, supra in the Answer Brief of Dorita High Horse, omitted a portion of the Opinion near the end of Page 326 in said Opinion. The sentence omitted from said Opinion by Dorita High Horse in her Answer Brief is as follows:

"And the regulations of the department are administrative of the act and partake of its legal force."

Reiterating then, Blanset v. Cardin supra is authority that the Regulations of the Department of the Interior are administrative of the act and partake of legal force, and as your Petitioners have previously stated in their Brief of November, 1969, and particularly as set out in the Appendix to said Brief (App. A, A-2, A-3, and A-4) the Regulations of the Secretary of the Interior are absolutely void of any statement or requirement that the Indian testators must execute their Wills in such a manner that they will disburse equity among their heirs. As a matter of fact, the Regulations may be summarized by quoting Regulation 15.28:

"§ 15.28 'Making, approval as to form, and revocation of wills.' (a) An Indian of the age of 21 years and of testamentary capacity, who has any right, title, or interest in trust or restricted property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses.

(b) Where a will has been executed and filed with the superintendent during the lifetime of the testator, the will shall be forwarded by the superintendent to the examiner of inheritance, who shall pass on the form of the will and then return it to the superintendent with appropriate instructions. A will shall be held in absolute confidence, and its contents shall not be divulged prior to the death of the testator.

(c) The testator may, at any time during his lifetime, revoke his will by a subsequent

> will or other writing executed with the same formalities as are required in the case of destroying the will with the intention of revoking it. No will that is subject to the regulations of this part shall be deemed to be revoked by operation of the law of any State."

After reading said Regulations, we ascertain that the only requirement for an Indian testator to make a Will is that the Indian must be 21 years of age and of testamentary capacity. Of course, undue influence would cloud his testamentary capacity as would fraud, mental incompetency and the other usual grounds for voiding Wills due to the failure of the testator to possess proper testamentary capacity and there appears no mention of the Indian disbursing equity when he executes his Will.

The instructions found on the printed Will forms furnished by the Department of the Interior instructing Field Officers as to the procedure to be followed when an Indian testator executes his Will, are found in the Joint Appendix filed herein at Page 66 and a portion of the instructions in question are as follows:

> "3. Witnesses and testator must sign in the presence of each other. Read the will carefully to testator and be sure that he understands it and that it expresses his wishes. (Emphasis added).

We thus see again, a total void of any mention that the Indian testator is under an obligation to execute a Will that will disburse equity among his heirs.

At Page 22 in the Answer Brief of Dorita High Horse, she mentions that Heffelman v. Udall,

378 F.2d 109 (10th Cir. 1967), Cert. den. Nov. 7, 1967, 389 U.S. 926, is authority that Sections 1 and 2 of the Act of June 25, 1910, 25 U.S.C. Secs. 372 and 373 were to be read as complementing each other and that your Petitioners believe that Heffelman v. Udall supra did not make a valid statement in regard to Sections 1 and 2 complementing each other.

Section 1 of the 1910 Act, 25 U.S.C. 372 provides that any Indian to whom an allotment of land has been made, or may hereinafter be made, dies before the expiration of the trust period or before the issuance of a fee simple patent, without having made a Will, then the Secretary of the Interior shall ascertain the legal heirs of the said Indian decedent and his decision shall be final and conclusive.

Section 2 of the 1910 Act, 25 U.S.C. 373 states that any person of the age of 21 years having any right, title, or interest in an Indian allotment held under trust or other patent containing restrictions or having individual Indian moneys or other property held in trust shall have the right prior to the expiration period of the trust, to dispose of such property by Will in accordance with regulations to be prescribed by the Secretary of the Interior provided, however, That no Will so executed shall be valid unless and until it is approved by the Secretary of the Interior.

Your Petitioners hope that this Court will note that there is a considerable variance between Section 1 of the 1910 Act and Section 2 of the 1910 Act. Section 1 of the 1910 Act states that the decision of the Secretary of the Interior relative to the heirs of the decedent Indian shall be final and conclusive and Section 2 of the 1910 Act does not contain the final and conclusive

phrase. Also, Section 1 of said Act states that it applies to Indians having allotments or who will hereafter have allotments and dies without having made a Will, while Section 2 of said Act applies to all persons of the age of 21 years or over having any right, title, or interest, in any allotment held in trust or restricted or having an interest in trust moneys, shall have the right to dispose of said properties by a Will.

Section 1 of the 1910 Act applied only to Indians having allotments or who will thereafter have allotments, while Section 2 of said Act applies to any person or persons over the age of 21 years having an interest in trust properties, including real property and personal property giving said persons, even non-Indians and Indians not having allotments the right to make a Will provided said Will is made in accordance with the Regulations issued by the Secretary of the Interior. There are many variances between Section 1 and Section 2 of the 1910 Act and your Petitioners disagree with the Heffelman premise that Sections 1 and 2 of said Act complement each other and should be considered together.

At Page 22 continued on Page 23 in the Answer Brief of Dorita High Horse, there appears the argument that the right of review under the Administrative Procedure Act where agency action is by law committed to agency discretion prohibits Judicial review and Dorita High Horse continues with the argument that Section 2 of the Act of June 25, 1910, as amended, gives the Secretary of the Interior wide powers that are discretionary and the implication, of course, is that due to the discretionary powers of the Secretary of the Interior under Section 2 of the Act of June 25, 1910, as amended, Judicial review under the Administrative Procedure Act is prohibited because agency action is by law committed to agency discretion. This argument was presented

by the Secretary of the Interior in Homovich v. Chapman, 191 F. 2d 761 (D.C. Cir. 1951) which involved litigation concerning the Will of an Indian and the approval or disapproval of same by the Secretary of the Interior pursuant to Section 2 of the Act of June 25, 1910, as amended by the Act of February 14, 1913. At Page 764 in the Opinion, Circuit Judge Prettyman answered two arguments of the Secretary of the Interior, namely, that the final and conclusive clause of Section 1 of the 1910 Act prohibits review under Section 2 of the 1910 Act as amended, and the second argument was that the Administrative Procedure Act prohibits Judicial review where agency action is by law committed to agency discretion:

> "The Secretary maintains that his action in respect to the wills of Indians is not reviewable by the courts. But the actions of Secretaries in respect to these wills have been reviewed by the courts,[5] and no case to the contrary is cited to us. Such review is not precluded by the statute. The Secretary argues that, because Section 1 of the 1910 Act, dealing with the determination of the heirs of an Indian who dies without a will, provides that his determination 'shall be final and conclusive', therefore Section 2 of that Act, deal-

---

4. Blundell v. Wallace, 1925, 267 U.S. 373, 45 S.Ct. 247, 69 L.Ed. 664; Blanset v. Cardin, 1921, 256 U.S. 319, 41 S.Ct. 519, 65 L.Ed. 950; Hanson v. Hoffman, 10 Cir., 1940, 113 F.2d 780.

5. See cases cited note 4 supra; also Nimrod v. Jandron, 1928, 58 App. D.C. 38, 24 F.2d 613.

ing with wills, must be read as though it contained a similar provision, although in fact it does not. We think it plain that, if Congress had meant that the decisions in Section 2 should be final and conclusive, it would have said so; in the immediately preceding paragraph it had so provided when it meant to do so. The mere fact that the acts of the Secretary in providing regulations for the execution of these wills and in approving them, required the exercise of discretion and judgment on his part, does not preclude judicial review of his action. To be sure, if upon such review it appears that his action was within the scope of the authority conferred upon him, the court cannot disturb his decision. But that is a different rule from the rule of total non-reviewability. The Administrative Procedure Act (Section 10) [6] forbids judicial review only where statutes 'preclude' such review or where agency action is 'by law committed to agency discretion.' No statute 'precludes' this review, and the Secretary would have us

---

6. 60 Stat. 243 (1946), 5 U.S.C.A. § 1009. See discussion in Kristensen v. McGrath, 1949, 86 U.S. App. D.C. 48, 179 F.2d 796 (not discussed by Supreme Court, McGrath v. Kristensen, 1950, 340 U.S. 162, 169, 71 S. Ct. 224, 95 L.Ed. 173; also in Air Line Dispatchers Ass'n, et al. v. National Mediation Board, et al. 1951, 89 U. S. App. D.C., _____, 189 F.2d 685, and also in Capital Transit Company v. United States, 1951, D.C., 97 F.Supp. 614.

stretch the second prohibitory clause far beyond its meaning. He says that there can be no review where agency action 'involves' discretion or judgment. Obviously the statute does not mean that; almost every agency action 'involves' an element of discretion or judgment. Whether the court should set aside an agency action founded upon the exercise of discretion and judgment is, as we have said, a totally different question from whether the court may review the action for purposes of determining its validity.

The judgment of the District Court must be and is hereby

Affirmed."

Also, the argument that agency discretion prohibits Judicial review has been cogently stated to be a false premise in many instances by Professor Louis L. Jaffe, Professor of Administrative Law, in his textbook, Judicial Control of Administrative Action at the bottom of Page 374:

"The other exception of action 'committed to agency discretion' has, perhaps understandably, created a certain confusion and uncertainty. The further provisions of the judicial-review section make it clear that the mere presence of agency discretion does not oust review. Under the heading 'Scope of Review' an agency action may be set aside for 'an abuse of discretion,' 278

---

278 APA § 10 (e), 60 Stat. 243 (1946), 5 U.S.C. § 1009 (e).

which clearly implies reviewability despite the presence of discretion. As one court has said, 'almost every agency action 'involves' an element of discretion or judgment.'" [279]

---

279 Homovich v. Chapman, 191 F.2d 761, 764 (D.C. Cir. 1951). See also Adams v. Witmer, 271 F.2d 29 (9th Cir. 1958).

Another recent case relative to Judicial review where agency discretion is used is the case of Jones v. Freeman, 400 F.2d 383 (1968). The Court of Appeals for the Eighth Circuit held that Judicial review could be given to a regulation issued by the Secretary of Agriculture permitting the Forest Service to impound trespassing livestock in a national forest. The Circuit Court, Judge Heaney, in his Opinion in Jones v. Freeman supra, makes the following enlightening observation at Pages 389 and 390 in said Opinion:

> "Finally, we consider whether the action is one 'committed to agency discretion by law,' 5 U.S.C. § 701 (a) (2), and, thus, not reviewable. See generally, United States v. Pink, 315 U.S. 203, 63 S. Ct. 552, 86 L. Ed. 796 (1942).
>
> The Secretary's discretion to preclude privately-owned animals from the National Forest is accepted by the plaintiffs and is recognized by this Court. United States v. Reeves, D.C., 39 F. Supp. 580 (Ark. 1941). Cf. McMichael v. United States, 355 F.2d 283 (9th Cir. 1965).
>
> Judicial review under a statute authorizing agency action is not preclud-

ed because some of that action may be 'committed to agency discretion by law.' 5 U.S.C. § 701 (a) (2). Rather, judicial review is precluded only to the extent that such discretion exists. Davis, Unreviewable Administrative Action, 15 F.R.D. 411, 428 (1954).

The act of impounding and assessing expenses involves little or no discretion. They are acts based on a perception of facts. Few policy judgments are involved. The actions are judicially reviewable. 9 "

---

9. Many agency actions involving discretion are subject to judicial review. Ferry v. Udall, 336 F.2d 706 (9th Cir. 1964); Homovich v. Chapman, 89 U.S. App. D.C. 150, 191 F.2d 761 (1951). This is evident upon an examination of Section 706:

'§ 706. Scope of review

'* * * The reviewing court shall___
*
'(2) hold unlawful and set aside agency action, findings, and conclusions found to be ___
'(A) Arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
* * *'
(Emphasis added.)

This Court will observe upon reviewing the Joint Appendix filed herein that in the Motion of Plaintiffs for Summary Judgment in the Joint

Appendix, Pages 25 and 26, one of the grounds of the Plaintiffs for Summary Judgment was as follows:

> "1. The Defendant's actions complained of are arbitrary, capricious, unreasonable and an abuse of discretion and are not in accordance with the Law and are not supported by substantial evidence." (Emphasis added.)

and of course, Judge Eubanks, the Trial Court, approved and granted the Plaintiffs Motion for Summary Judgment. Judge Eubanks, in his Opinion overruling the Secretary of the Interior for non-approval of the Indian testators Will, Joint Appendix 35 and 36, made the following cogent observation:

> "Congress has conferred the will making right upon all adult Indians. The only limitation upon that right is that the will must be approved by the Secretary of the Interior. It is incumbent upon the Secretary that he not lose sight of the fact that the will making right has been conferred upon the Indian and not upon the Secretary. Surely there must be a point beyond which the Secretary cannot go in withholding his approval before his act of disapproval is to amount to an arbitrary denial of the statutory will making right.
>
> Where disapproval is founded upon some rational basis, denial of approval of an Indian will cannot be said to be an abuse of discretion.[7] Examples of what may constitute reasonable bases upon which approval may be denied are lack of testamentary capacity, fraud,

duress, coercion, undue influence, over-reaching, substantially changed conditions as to the decedent's heirs or estate occuring subsequent to the making of the will, and improvident disposition. In the decision now under review, the will was denied approval because the decedent had failed to make provision for a daughter born out of wedlock. In Attocknie v. Udall, 261 F. Supp. 876 (W.D. Okla. 1966), this court upheld a decision of the Secretary which granted approval to an Indian will in exactly opposite circumstances from those presented here. In that case approval was granted to a will wherein no provision was made for a son born out of wedlock. I am unable to perceive the distinction wherein that will was considered to be susceptible of approval but the will which is the subject of this review was not considered to be susceptible of being accorded the same treatment.

This decedent's will was not an unnatural one in light of the circumstances. Someone has lost sight of the fact here that Congress has conferred the right to make a will upon the Indian and not upon the Secretary. The Secretary can no more use his approval powers to substitute his will for that of the Indian than he can dictate its terms. If the will making right is to be meaningful the Indian must be given a free hand to decide upon those persons who shall be the object of his bounty without unreasonable Secretarial interference. I find that the denial of approval of the last will and testament of George Chahsenah lacks a rational basis and is an unreasonable and arbitrary denial of a right conferred upon him by Congress.

> The motion of the plaintiff is granted, the motions of the defendant and the intervenor are denied, and the will is remanded to the Secretary of the Interior with directions to approve it and distribute the decedent's estate in accordance with its provisions." (Footnote deleted.)

REPLY OF PETITIONERS TO ARGUMENT PART II STYLED "EVEN IF THE SECRETARY'S ACTION IS SUBJECT TO JUDICIAL REVIEW, THE SCOPE OF THAT REVIEW IS LIMITED TO THE DETERMINATION BY THE COURTS AS TO WHETHER THAT ACTION IS WITHIN THE SCOPE OF THE AUTHORITY CONFERRED UPON HIM" OF RESPONDENT, DORITA HIGH HORSE, IN HER ANSWER BRIEF OF DECEMBER, 1969.

At Pages 23 and 24 in the Answer Brief of Dorita High Horse, there appears the argument that the Secretary of the Interior was not exceeding his authority in this case even if it should be held that the action of the Secretary is subject to Judicial review.

The following appears at the bottom of Page 23 and at the top of Page 24 in said Brief:

> "Then in a proviso, he is delegated the authority to approve Wills. It is submitted that this authority transcends the power to check the Will for compliance with the formalities prescribed by the regulations. The proviso says, 'no will so executed,' i.e., in compliance with the regulations adopted, 'shall be valid or have any force or effect unless it shall have been approved by the Secretary."

Your Petitioners note that Dorita High Horse has not correctly quoted the proviso and she says

specifically as follows:

> "'shall be valid or have any force or effect unless it shall have been approved by the Secretary.'"

which is referring to the approval of the Will by the Secretary of the Interior. The correct statement as the proviso appears in the Statute Books is as follows:

> "That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior."

In other words, careful scrutiny will show that the phrase "and until" was left out of the quotation of the proviso of the Statute in question by Dorita High Horse. The conjunctive phrase "and until" is an expression of a happening that will occur in the future and the Statute when correctly quoted connotes an entirely different meaning from the quotation as set out by Dorita High Horse in her Brief. If the only conjunction in the proviso was "unless", the proviso could be interpreted to mean that the Secretary of the Interior had the absolute authority to either approve or disapprove Wills of Indian testators, but when both conjunctions "unless and until" are used together, an entirely different meaning is expressed by the proviso in the Statute. It is the opinion of the Petitioners that the Statute as correctly quoted using both conjunctions "unless and until" does not give the Secretary of the Interior the arbitrary power to refuse to approve the Will of an Indian for equity.

There would be no criteria by which an Indian could make his Will and by which the employees of the Bureau of Indian Affairs could advise an Indian on how to make his Will if the Secretary of the Interior has the right to arbitrarily refuse to approve an Indian testators Will based on his decision that the Indians Will was not compatible with one or more rays of equity shinning out from the equitable spectrum as compiled by the Secretary of the Interior.

REPLY OF PETITIONERS TO ARGUMENT PART III STYLED "REGARDLESS OF THE DECISION AS TO REVIEWABILITY, AND THE LIMITED DEGREE OF REVIEW SUGGESTED ABOVE IN II, NEVERTHELESS THE ACTION OF THE SECRETARY MUST BE SUSTAINED BY THIS COURT BECAUSE THE DECISION OF THE SECRETARY WAS NOT CAPRICIOUS OR ARBITRARY, BUT HAD A RATIONAL BASIS. UNDER THESE CIRCUMSTANCES, THE SUBSTITUTION BY A COURT OF ITS JUDGMENT FOR THAT OF THE SECRETARY WOULD BE A USURPATION OF THE CONGRESSIONAL DELEGATION OF DISCRETION TO THE SECRETARY" OF RESPONDENT, DORITA HIGH HORSE, IN HER ANSWER BRIEF OF DECEMBER, 1969.

Dorita High Horse has stated in her Answer Brief that the decision of the Secretary of the Interior to disapprove the Will of George Chahsenah had a rational basis and she quotes in her Answer Brief at Pages 26, 27, and 28 from the Opinion of the Regional Solicitor speaking for the Secretary of Interior, which Opinion of the Regional Solicitor is set out in full in the Joint Appendix at Pages 82 through 87 inclusive. Upon detailed examination of this Opinion, the Court will ascertain prior to the quoted part of said Opinion that the Regional Solicitor had held that the Will in question met all of the technical requirements

of making a Will, that the factum of the Will was proper, and the preceding paragraph of the Opinion of the Regional Solicitor is as follows:

> "The Examiner concluded that the will dated March 14, 1963, met the technical requirements for a valid will and was not unnatural in failing to provide for the decedent's daughter as there was no evidence that the decedent had any close paternal ties to the daughter during the later part of his life. He thereupon approved the latest purported will of the decedent by an order dated August 31, 1966, apparently without considering whether the circumstances were such as to justify such approval as an exercise of the discertionary authority conferred upon the Secretary by 25 U.S.C. § 373. The Secretary's responsibility is not adequately discharged when he, or an examiner acting for him, determines that a purported will meets the technical requirements for a valid dispository instrument and thereupon, without further consideration, approves the will as a matter of course. When a purported will is submitted for approval and it has been determined that it meets the technical requirements for a valid will, further consideration must be given before approving or disapproving it to determine whether approval will most nearly achieve just and equitable treatment of the beneficiaries thereunder and the decedent's heirs-at-law. [1]" (Footnote deleted.)

Dorita High Horse in her Answer Brief also omitted the last paragraph of the said Opinion of the Regional Solicitor and the omitted paragraph is as follows:

> "Each of the decedent's previous wills would receive similar disposition if offered for approval because each of them disinherits the decedent's daughter. It follows that no useful purpose would be served by additional hearings, for which reason the Examiner's denial of a petition for rehearing is not reversed. Accordingly, the entire estate of the decedent remaining after payment of allowed claims shall be distributed, without further order of the Examiner, to Dorita High Horse as the sole heir of the decedent."

In other words, the Regional Solicitor, speaking for the Secretary of the Interior through his delegated authority, became entirely intoxicated by the manner in which he exercised his discretionary responsibility, which the Regional Solicitor said was the responsibility to determine whether or not the Will of George Chahsenah would achieve a just and equitable treatment of the beneficiaries thereunder and the heirs at law of George Chahsenah, the decedent Indian testator.

The Regional Solicitor, speaking for the Secretary of the Interior, stated that he would disapprove all prior Wills of the Indian testator and although his Order disapproving the prior Wills is probably void for lack of due process, nevertheless, it does show the bias in this case of the Regional Solicitor, speaking for the Secretary of the Interior. The Secretary of the Interior has made an official statement in said Opinion that no Indian testator could make a Will willing out his natural child or illegitimate child where the Indian testator had not supported the said natural or illegitimate child while the said child was a minor and if a Will was so executed, it would not be approved by the Secretary of the Interior.

The entire record in this case concerning the addiction of the Indian testator to alcohol and the fact that he made several prior Wills and that he had spent his money foolishly at times, was to no avail in the attempt to discredit his Will if the equity theory of the Secretary of the Interior is followed because the Indian testator had failed to provide for his natural or illegitimate daughter in the terms of his Will and therefore, his Will would be disapproved for the equity reason only. In converse, if the evidence had shown that the Indian testator had been an outstanding citizen and had participated in Civic Affairs and had been deeply religious the latter part of his life, and had made a Will giving a portion of his Estate to his Church and perhaps to other public institutions and his Indian kin folk with whom he lived at the time of his death, the same equity reasoning would be applied and the Will would still be unapproved by the Secretary of the Interior because of the failure of the Indian to provide for his natural daughter under the terms of his Will.

It is your Petitioners interpretation of the Opinion of the Secretary of the Interior in the case under consideration that the Secretary of the Interior has actually stated that the factum of the Will is immaterial if an Indian has a natural or illegitimate child that he did not support during the minority of the child, if the Will of the Indian does not devise and bequeath a substantial part of the Estate of the Indian to the said natural child, which, in the opinion of your Petitioners, is an attempt by the Secretary of the Interior to exercise his authority in such a manner that he will substitute his Will for that of the Indian and even though the Secretary of the Interior in certain cases might have certain discretionary responsibilities, he has misused his responsibility herein.

REPLY OF PETITIONERS TO ARGUMENT OF DORITA HIGH HORSE AND THE SECRETARY OF THE INTERIOR THAT JURISDICTION HEREIN PURSUANT TO MANDAMUS 28 U.S.C. 1361 IS IMPROPER IN THIS CASE.

Your Petitioners will reply to both the argument of Dorita High Horse and to the Secretary of the Interior in their Answer Briefs that there is no merit to the argument of your Petitioners that 28 U. S.C. 1361 on Mandamus applies in this case, therefore in Reply to the said statement in the Answer Briefs concerning 1361 on Mandamus, your Petitioners state that they realize that this Court has decided many cases on Mandamus in the years past and each Justice of this Court has previously determined in his own mind the fundamental precepts of the law of Mandamus.

Your Petitioners would like to present to the Court for their further consideration of the law of Mandamus, the following pertinent quotations from Clark Byse and Joseph V. Fiocca in their article on the Mandamus and Venue Act in Volume 81 of the Harvard Law Review Article 308 at Pages 333 and 334 as follows:

> "The superiority of the equitable traditon stems from the fact that in actions applying equitable principles 'courts and counsel typically focus immediately upon merits,' that is, the scope of the delegated power, whereas in cases applying mandamus principles, analysis often is clouded by the ministerial-discretionary distinction and other technicalities of mandamus law.
>
> As a mode of analysis, the ministerial-discretionary dichotomy is largely illusory because there are few federal administrative determinations that do not involve an element of discretion and few that are

wholly discretionary. Examples of the latter might be the President's selection of members of his Cabinet and his conduct of foreign affairs; but except for this very limited class of completely discretionary functions, administrative officials typically have discretion concerning some elements of their decisions and lack discretion concerning other elements. For example, issuance of passports is a discretionary act, but that discretion does not include withholding a passport because of the applicant's beliefs or associations. The fact that the officer has discretion is not conclusive; the determinative issue is the scope of the discretion. Only after that issue has been resolved can it be decided whether the act in question is subject to judicial control.

In making discretionary determinations, administrative officials usually take into account a variety of factors. A litigant may contend that the applicable statute does not permit the administrator (1) to consider a particular factor, or (2) to give a particular factor controlling weight, or (3) to refuse to consider a possibly relevant factor. When these contentions are presented to a court, it must decide whether the administrator's action was consistent with the particular statute and the congressional purpose. This is what courts do in injunction actions against administrators and in other judicial review proceedings. The same process should be utilized in mandamus actions, because they present the same basic issue: the proper scope of the administrator's authority.

> The weakness and undesirability of the ministerial-discretionary distinction is that it permits - perhaps encourages- courts to avoid the difficult task of determining the scope of the delegated power or discretion. Rather than studying the applicable statute, its legislative history, administrative practice under the statute, and utilizing all other relevant aids to determine the scope of the discretion, the judge may conclude that since the official was meant to exercise discretion, the writ will not issue. This, of course, deprives the petitioner of meaningful judicial review, for typically he does not contend that the defendant official was not delegated any discretion but, rather, that withholding the relief requested for the reasons stated was not a permissible exercise of the discretion delegated." (Emphasis added.) (Footnotes deleted.)

The said Article goes further into detail concerning actions filed under 28 U.S.C. 1361 and your Petitioners quote further from the Article by Professor Byse and Joseph V. Fiocca as follows at Pages 350 through 354 inclusive:

> "Another potential pitfall for the litigant was opened by a recent case where it was intimated that a declaratory judgment would not be appropriate in a section 1361 action. [152] This is clearly incorrect. While it is true that the declaratory judgment statute [153] is not

---

152 Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364, 367 (10th Cir.), cert. denied, 385 U.S. 831 (1966).

153 Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1964).

of itself jurisdictional, [154] it authorizes relief in actions where the court has another basis of jurisdiction. [155] Since from the very beginning section 1361 was intended to be jurisdictional, it can provide the independent basis of jurisdiction necessary to sustain an action for a declaratory judgment. [156]

---

154 Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667 (1950).

155 Lee Wing Hong v. Dulles, 214 F.2d 753 (7th Cir. 1954); Brownell v.Ketcham Wire & Mfg. Co., 211 F.2d 121 (9th Cir. 1954). See also 3 W. Barron & A. Holtzoff, Federal Practice and Procedure § 1262 (C. Wright ed. 1958).

156 A close question might arise if, in an action where section 1361 were the sole basis of jurisdiction, the plaintiff sought declaratory relief as to a matter which would normally be a subject of negative rather than affirmative injunctive relief, such as a declaratory judgment against the enforcement of an impending regulatory order. It might be argued that such an action lacked the requisite jurisdictional base, since section 1361 was intended to enable the granting of equitable relief 'in the nature of mandamus.' The plaintiff, however, could reply by pointing out that section 1361 is designed so that one may compel an officer to 'do his duty,' that it is the duty of the officer not to perform an illegal act, and therefore, that section 1361 should be construed to apply to such a case. In the event this interpretation does not prevail, the action might nontheless be salvaged if the court were willing to accept the APA as a jurisdictional grant.

Fortunately, some courts have given section 1361 a more hospitable construction. An outstanding example is Ashe v. McNamara.[157] Plaintiff Ashe was a steward third class in the Navy in 1945 at which time he and two co-defendants were tried by a general court-martial for assaulting another member of the Navy. The three defendants were represented by a single counsel. At the trial one of the defendants, Brown, who had informed counsel that he had attacked the victim, changed his story and testified that Ashe had struck the blows. Defense counsel immediately informed the court that this unexpected testimony placed him in the position of being unable to defend Brown and Ashe without attacking one or the other and he stated, 'I don't think I should continue to represent the two defendants.' The court, nevertheless, directed counsel to proceed on behalf of all the defendants, and all were convicted, sentenced to terms in prison, and given dishonorable discharges from the Navy.

Ashe was released from prison in 1948. In 1959 he petitioned the Board of Correction of Naval Records to change his discharge to an honorable one. The Board denied the petition, the Secretary of Navy approved the denial, and the United States Court of Military Appeals dismissed Ashe's petition for review. Ashe, a Massachusetts resident, instituted an action in the federal district court in Massachusetts pursuant to section 1361 against the Secretary of Defense to compel the Secretary to change the dishonorable character of the discharge.

---

157 355 F.2d 277 (1st Cir.), rev'g 243 F. Supp. 243 (D. Mass. 1965).

The district court dismissed the action on the ground that article 76 of the Uniform Code of Military Justice [158] made Ashe's discharge 'final and conclusive' and not subject to collateral attack except possibly in a petition for habeas corpus or in an action for back pay. On appeal, the First Circuit reversed the lower court's judgment in a unanimous opinion written by Judge Hastie, sitting by designation. Judge Hastie found that it was impossible for the trial counsel to function effectively on behalf of both men. He concluded that Ashe's conviction 'was the product of court-martial procedure so fundamentally unfair' that Ashe would have been entitled to release from imprisonment in a habeas corpus proceeding. The question thus presented was whether, since Ashe no longer was imprisoned and therefore habeas corpus did not lie, another form of relief was available. The court's conclusion was that section 1361 provided an appropriate remedy.

Judge Hastie's opinion in Ashe v. McNamara is an admirable treatment of section 1361. Jurisdiction was based exclusively upon that section. [159] The

---

158 10 U.S.C. § 876 (1964).

159 Judge Hastie noted, 'At the outset, it merits mention that this action is brought under section 1361 of title 28, United States Code, part of a 1962 enactment which enlarged the jurisdiction of the district courts and liberalized venue.' 355 F.2d at 279.

lower court had denied relief. It would have been easy for the appellate court to have quoted from the report of the Senate Judiciary Committee that the statute gave the judiciary 'no control over the substance of the (administrative) decision,' [160] to have cited some of the older Supreme Court mandamus cases to the effect that 'where the duty . . . depends upon a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus,' [161] and to have affirmed the decision of the lower court. Fortunately, Judge Hastie did nothing of the kind. Instead, he examined the relevant statutes, studied the legislative materials which illumined their meaning, determined the scope of the power delegated to the administrative officials, and ordered relief for the plaintiff.

## V. CONCLUSION

The Mandamus and Venue Act of 1962 has substantially achieved the objectives of its sponsors. First, citizens have been relieved of the expense and inconvenience caused by the requirement that certain nonstatutory judicial review actions be brought in Washington, D.C., for judicial review actions in local federal courts no

---

160 S. Rep. No. 1992, 87th Cong., 2d Sess. 4 (1962).

161 Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 219 (1930).

longer need be dismissed because of the doctrine of indispensable parties or the lack of original mandamus jurisdiction in the federal district courts outside the District of Columbia. Second, the courts have not construed the legislation to authorize them to review governmental determinations that before 1962 would not have been reviewable by the federal courts in the District of Columbia. Thus, they have refused to review interlocutory administrative action and they have -- albeit at times with understandable reluctance---respected the bar to judicial review interposed by the Supreme Court's interpretation of the sovereign immunity doctrine. Third, the courts outside the District of Columbia in reviewing dismissals of government employees and other official acts under section 1361 have not --except possibly in a few sporadic cases --- applied a scope of review that is in any observable way significantly different from the scope of review applied by the federal courts in the District of Columbia. In sum, section 1361 appears to have been accepted by the federal judiciary --- as it was intended by its sponsors --- as a modest legislative reform limited to achieving decentralization of nonstatutory judicial review actions.

Despite contrary expressions in a few opinions, it does not appear that the clause inserted at the insistence of the Department of Justice, 'in the nature of mandamus,' has caused a revival or expansion of either the ministerial-discretionary distinction or the clear-duty-to-act rule. Although the likelihood of such a revival or expansion probably is not great, the

possibility should not be overlooked. A busy judge might be misled by a superficial reading of quotations from the Senate Judiciary Committee report [162] or from some of the older Supreme Court opinions in mandamus cases. [163] Plaintiff's counsel thus has a special responsibility both to invite the court's attention to the complete legislative history of section 1361 and to enlighten the court concerning the proper role

---

162 The portions of the report most likely to mislead are the following:

(The bill) grants jurisdiction to the district courts to issue orders compelling Government officials to perform their duties and to make decisions in matters involving the exercise of discretion, but not to direct or influence the exercise of the officer or agency in the making of the decision . . . . .

The Department of Justice in its report on the bill expressed concern that the bill might be interpreted to give the district courts jurisdiction to order a Government official to act in a manner contrary to his discretion. The committee, therefore, has adopted the amendment set forth to section I which specifies that the court can only compel the official or agency to act where there is a duty, which the committee construes as an obligation, to act or, where the official or agency has failed to make any decision in a matter involving the exercise of discretion, but only to order that a decision be made and with no control over the substance of the decision.

S. Rep. No. 1992, 87th Cong., 2d Sess. 2,4, (1962).

163 E.g., United States ex rel. McLennan v. Wilbur, 283 U.S. 414 (1931); Wilbur v. United States ex rel. Kadrie, 281 U.S. 206 (1930).

> of the judiciary in a 'nature-of-mandamus' case, which is, as has been stressed throughout this article, that the court should utilize all relevant legislative and other materials to determine the scope of the discretion of power delegated to the officer. Needless to say, counsel for the plaintiff, as well as counsel for the Government, should provide every possible assistance to the court in the latter's effort to ascertain the nature and extent of the defendant's authority."

I presume the Court will note the criticism of Byse and Fiocca of two of the leading cases cited against Mandamus herein by Dorita High Horse and the Secretary of the Interior in their Answer Briefs. In their footnote 152 supra, Prairie Band of Pottawatomie Tribe of Indians v. Udall, 355 F.2d 364 is criticized by saying that the import of the decision is incorrect and in their footnote 161 supra, Wilbur v. United States, 281 U.S. 206 cited by the Secretary of the Interior as authority contra to Mandamus is criticized as authority which is now out of date according to the modern trend.

Your Petitioners believe that it was the opinion of the Trial Court based upon the past application of the Statute in question (25 U.S.C. 373) by the Department of the Interior and by their own interpretation of the way the Statute should be applied, the Secretary of the Interior had no option but to approve the Will of the Indian testator when the factum of the Will was satisfactory and there was no other cogent reason for disapproving the Will except the equity doctrine authority, which had never been used by the Secretary of the Interior prior to that time as his reason for the approval or disapproval of the Wills of Indian testators. Your Petitioners will make further statements hereinafter in their

Reply Brief in regard to the fact whether or not the Secretary of the Interior had used the equity theory in prior cases as a reason for approving or disapproving Wills of Indian testators.

REPLY OF PETITIONERS TO ARGUMENT OF THE SECRETARY OF THE INTERIOR THAT THE 1910 ACT PRECLUDES REVIEW OF THE SECRETARY OF THE INTERIOR'S REFUSAL TO APPROVE AN INDIANS WILL DISPOSING OF ALLOTTED LANDS.

Time for preparing this Reply Brief for the purpose of filing in the Court before oral argument is becoming limited. Your Petitioners are not going to make an attempt to answer every portion of the above argument by the Secretary of the Interior and your Petitioners have already answered the argument against Mandamus by the Secretary of the Interior.

Your Petitioners feel compelled to comment upon the statement of the Secretary of the Interior in his Answer Brief at Page 9. The Secretary in discussing Sections 1 and 2 of the Act of June 25, 1910, states that Sections 1 and 2 are parallel in many respects and the Secretary states that both sections empower the Secretary "in his discretion" to sell restricted lands, and both sections authorizes the Secretary to remove restrictions and issue patents to devisees and legatees, and the role of the Secretary under both sections is managerial and supervisory and requires the exercise of discretion. The Secretary continues that logic dictates that Congress intended for the Secretary to have the same authority with respect to approving Wills under Section 2 as he does with respect to determining heirs under Section 1 and the discretion of the Secretary to approve a Will should be no less than his discretion to determine heirs.

It is your Petitioners interpretation of the statement of the Secretary in his Brief that the determining of heirs of a deceased Indian dying intestate without a Will and owning an allotment is a discretionary function and in his discretion he can approve the heirs or not approve the heirs. Upon reading Section 1, the section states that the Secretary of the Interior "shall" ascertain the legal heirs of the decedent intestate Indian and his decision shall be final and conclusive. Section 1 of the 1910 Act proceeds with certain discretionary functions relative to the removal of restrictions and the issuance of patents if the Secretary shall find the Indian capable to have his property unrestricted, etc., but these discretionary decisions are not applicable when the Secretary of the Interior is making a determination of the legal heirs because he is directed and ordered by Congress to determine the heirs of an intestate Indian.

Consequently, it is the opinion of your Petitioners that the discretionary function of the Secretary of the Interior under Section 1 of the 1910 Act and Section 2 of the 1910 Act concerns the removal of restrictions from trust and restricted properties, etc., but the said discretionary functions of the Secretary of the Interior do not inure to the approval of the heirs of the decedent Indian under Section 1 and the approval of the Will of an Indian under Section 2 of the 1910 Act. The Secretary must approve the heirs of the decedent intestate Indian and your Petitioners believe it is also his duty and not a discretionary act to approve the Will of an Indian if the factum of the Will is proper and in accordance with the regulations issued by the Secretary of the Interior.

In the Answer Brief of the Secretary of the Interior, he stated that an absurb situation

could result if Sections 1 and 2 are not read together as illustrated by the case of Hayes v. Seaton, 270 F.2d 319 (C. A. D. C.). The Answer Brief of the Secretary continues as follows:

> "In that case, the Secretary was called upon to decide whether a deceased Indian's son and legatee had survived his father (who left a will), the son (who died intestate) having disappeared one year before the father's death. The majority opinion characterized that decision as a determination of the son's legal heirs, under Section 1. Chief Justice Burger, then Circuit Judge, argued persuasively in his dissent that both Sections 1 and 2 were applicable to that determination. In line with the prior holdings of the District of Columbia Circuit referred to above, Judge Burger feld that Section 2 determinations were reviewable."

The Secretary then further proceeds to justify his view point that Sections 1 and 2 should be read together. Your Petitioners believe that a perusal of the dissenting Opinion of Chief Justice Burger in Hayes v. Seaton, Supra nullifies and overrules the argument of the Secretary of the Interior that Sections 1 and 2 should be read together. Your Petitioners believe that it is entirely possible that this Court may apply temporal depth and now rule that decisicns under both Sections 1 and 2 are subject to Judicial review.

It has been the recent philosophy of this Court to allow an Indian as an individual, individually, to have his day in Court as exemplified by Poafpybitty v. Skelly Oil Co., 390 U.S. 365. This recent case, of course, held that an Indian as an individual could bring a suit against an Oil Company for improper venting

of gas from an oil and gas lease on trust Indian lands which lease had been issued and approved pursuant to United States Government Statutes and Regulations. It was the contention of the Oil Company approved by the Oklahoma Supreme Court that the action could only be maintained by the United States acting by and through the Secretary of the Interior and consequently, could not be maintained by the Indian as an individual.

REPLY OF PETITIONERS TO ARGUMENT OF THE SECRETARY OF THE INTERIOR IN HIS ANSWER BRIEF THAT THE REFUSAL OF THE SECRETARY TO APPROVE THE WILL IN THIS CASE COULD NOT BE REVERSED BECAUSE THE SECRETARY PROPERLY TOOK EQUITABLE CONSIDERATION INTO ACCOUNT IN REACHING HIS DECISION.

Your Petitioners do not and can not agree with this argument presented by the Secretary of the Interior including his quotation from Homovich which does not correctly state the criteria of the said decision and the converse of this argument was answered by Chief Justice Burger in his dissent in Hayes v. Seaton supra. The Secretary of the Interior proceeds with the argument that the Secretary has always considered equity factors when he makes his decisions relative to the approval or disapproval of Wills of Indian testators and he cites the case of Estate of Wook-Kah-Nah, 65 I.D. 436.

Your Petitioners again reiterate as they have in all of their Briefs from the inception of this case in the Trial Court that the Secretary of the Interior has never used the criteria that equity must be disbursed by the Indian testator and if equity was not disbursed by making his Will, then the Secretary could refuse to approve his Will, which was done in this case.

Legal counsel for your Petitioners was an employee of the Solicitor's Office for the Secretary of the Interior stationed at Anadarko,

Oklahoma, during the years relative to the probate of the last Will of Wook-Kah-Nah and as has been previously stated, Wook-Kah-Nah made a Will leaving extremely valuable oil runs to two of her heirs and she gave no lands on which oil wells were located to several other children, including two grandchildren. She was also an illiterate woman who could not read or write, but nevertheless, the Secretary of the Interior on appeal when approving the decision of the Examiner of Inheritance who had approved her Will, made the following statement:

> "It is apparent from the record that the testatrix, Wook-Kah-Nah, knew each of her children and was aware of each one's financial status; she knew in a general way all of her properties and which were of greater value; she knew that she was receiving large royalty payments from the oil produced from her own allotment and she had a definite plan for the distribution of her estate in a manner which she believed would best meet the needs of her children and satisfy her own desires. It is evident that the testatrix demonstrated a sufficient capacity to satisfy the requirements for the validity of her will made of February 20, 1954." (Emphasis added.)

We thus see that the Secretary of the Interior on Appeal did not take equity into consideration when approving the Will of Wook-Kah-Nah.

Without being burdensome to the Court, we would again suggest that the Memorandum for the Assistant Secretary dated May 10, 1941, which has been heretofore quoted from in the Briefs of your Petitioners further nullifies the argument of the Secretary of the Interior that equitable principals have been used in the past in approving or disapproving the Wills of Indian testators and we believe this Court will so find.

## CONCLUSION

For the foregoing reasons in this Brief and in the original Brief, your Petitioners pray that this Court order the Estate of George Chahsenah distributed pursuant to the terms of his last Will and Testament dated March 14, 1963.

Respectfully submitted,

OMER LUELLEN
P.O. Box 96
First State Bank Bldg.
Hinton, Oklahoma 73047
Counsel for Petitioners

January, 1970

# SUPREME COURT OF THE UNITED STATES

No. 300.—October Term, 1969

Julia Tooahnippah (Goombi) et al., Petitioners, *v.* Walter J. Hickel, Secretary of the Interior, et al.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

[April 27, 1970]

Mr. Chief Justice Burger delivered the opinion of the Court.

We granted the writ to review the action of the Court of Appeals holding that the decision of the Regional Solicitor, acting for the Secretary of the Interior, disapproving the will of a Comanche Indian constitutes final and unreviewable agency action. We conclude that such decision is subject to judicial review.[1]

George Chahsenah, a Comanche Indian, died on October 11, 1963, unmarried and without a surviving father, mother, brother, or sister. His estate consisted of interests in three Comanche allotments situated in Oklahoma under the jurisdiction of the Bureau of Indian Affairs, Department of the Interior.[2] Shortly after

[1] The Court of Appeals decision, which held that the United States District Court for the Western District of Oklahoma had erred in reviewing the Regional Solicitor's action, is reported as *High Horse* v. *Tate*, 407 F. 2d 394.

[2] The General Allotment Act of February 8, 1887, 24 Stat. 388, as amended by Act of February 28, 1891, 26 Stat. 794, as amended by Act of June 25, 1910, 36 Stat. 855, 25 U. S. C. § 331 *et seq.*, provides, *inter alia*, for the allotment to individual Indians of parcels of land. The title to these lands is held by the United States in

Chahsenah's death, the value of those interests was fixed at $34,867. On March 14, 1963, Chahsenah had made a will devising and bequeathing his estate to a niece, Viola Atewooftakewa Tate, and her three children, petitioners herein. Chahsenah had resided with this niece a considerable portion of the later years of his life. His will made no mention of a surviving daughter, but stated that he was leaving nothing to his "heirs at law . . . for the reason that they have shown no interest in me."

The beneficiaries under the will sought to have it approved by the Secretary of the Interior, as required by 25 U. S. C. § 373.[3] A hearing was had before an Examiner of Inheritance, Office of the Solicitor, Department of the Interior. Dorita High Horse, claiming as sole surviving issue, and certain nieces and nephews of the testator contended that the will was not entitled to departmental approval, arguing that due to the effects

---

trust for the allottee, or his heirs, during the trust period, or any extension thereof. Chahsenah had inherited the interests he held at his death.

[3] Section 2 of the Act of June 25, 1910, 36 Stat. 856, as amended by Act of February 14, 1913, 37 Stat. 678, 25 U. S. C. § 373, provides in pertinent part:

"Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: *Provided, however,* That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: *Provided further,* That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator . . . . *Provided also,* That this section and section 372 of this title shall not apply to the Five Civilized Tribes or the Osage Indians."

of chronic alcoholism, cirrhosis of the liver, and diabetes, George Chahsenah was incompetent to make a will. Pursuant to the provisions of § 5 of the Act of February 28, 1891, 26 Stat. 795, 25 U. S. C. § 371, if Chahsenah had died intestate his putative daughter, Dorita High Horse, would have been an heir at law, regardless of whether or not her parents were married.

The Examiner found that the will of March 14, 1963, drawn on a form printed by the Department of the Interior for that purpose, was Chahsenah's last will and testament and that it had been prepared by an attorney employed by the Department of the Interior who advised the testator concerning the will. He also found that at the time the will was made the attorney and the witnesses executed an affidavit attesting that the will was properly made and executed, and that the decedent was of sound and disposing mind and memory and not acting under undue influence, fraud, duress, or coercion at the time of its execution. The Examiner found that Dorita High Horse was George Chahsenah's illegitimate daughter and his sole heir at law. He concluded, however, that the evidence presented by the contestants was not sufficient to outweigh the presumption of correctness attaching to a properly executed will, in addition to which were the unimpeached statements of the draftsman and witnesses that Chahsenah possessed testamentary capacity. The Examiner concluded that the testator's failure to provide for Dorita High Horse was not unnatural since there was no evidence of any close relationship between the two during any part of their lives. The will was approved and distribution in accordance with its provisions was ordered.

A petition for rehearing, contending that the evidence did not support the Examiner's conclusion regarding the decedent's competency, was denied. An appeal was taken to the Regional Solicitor, Department of the In-

terior, an officer having authority to make a final decision in the matter on behalf of the Secretary. He concluded that although the evidence supported the Examiner's finding that decedent's will met the technical requirements for a valid testamentary instrument, 25 U. S. C. § 373 vested in the Secretary broad authority to approve or disapprove the will. In exercising that discretion, the Regional Solicitor viewed his authority as requiring him to examine all the circumstances to determine whether "approval will most nearly achieve just and equitable treatment of the beneficiaries thereunder and the decedent's heirs-at-law." Under this standard he concluded that the decedent, an unemployed person addicted to alcohol[4] and living on the income he received from his inherited land allotments, had not fulfilled his obligations to his illegitimate daughter and had ceased cohabiting with her mother shortly before Dorita's birth, thus failing to provide her with a "normal home life during her childhood." The Regional Solicitor concluded that although the daughter was a married adult and could not legally claim support monies from her father or his estate, "it is inappropriate that the Secretary perpetuate this utter disregard for the daughter's welfare . . . ." Accordingly, he found that under the circumstances the Examiner's approval of the will was not a reasonable exercise of the discretionary responsibility vested in the Secretary. He thereupon set aside the Examiner's action, disapproved the will,[5] and ordered

---

[4] Reference to Chahsenah's supposed alcohol addiction carries an intimation that the Regional Solicitor saw some want of testamentary capacity, a notion contrary to his approval of the Examiner's finding of testamentary capacity and absence of undue influence.

[5] The Regional Solicitor gratuitously volunteered that if any of the five previous wills made by the testator between 1956 and 1963 were presented he would disapprove them because they made no provision for Dorita High Horse. The record discloses no inquiry

the entire estate distributed by intestate succession to Dorita High Horse as sole heir at law.

The beneficiaries under the will brought an action against the Secretary of the Interior in the United States District Court for the Western District of Oklahoma contending that the action of the Regional Solicitor was arbitrary, capricious, and an abuse of discretion, and that it exceeded the authority conferred upon the Secretary by 25 U. S. C. § 373. The plaintiffs sought to have the District Court review the Regional Solicitor's action in accord with the standards of the Administrative Procedure Act, 5 U. S. C. §§ 701–706 (1964 ed., Supp. IV), arguing that the District Court had jurisdiction over the matter by virtue of either that Act [6] or 28 U. S. C. § 1361.[7] Dorita High Horse was allowed to intervene as a party defendant. Both the Secretary and Dorita High Horse moved for summary judgment, contending that the action of the Regional Solicitor was within the authority conferred upon the Secetary, and, as such, is made final and unreviewable by 25 U. S. C. § 373. They also contended that the Regional Solicitor's decision was in accordance with the evidence, was not arbitrary or capricious, and did not involve an abuse of discretion. Although the Secretary conceded that the

---

by him into the circumstances of the execution of those wills, the testator's state of health at the time of their execution or his reasons for omitting provision for Dorita High Horse.

[6] The plaintiffs supporting the will appear to have relied upon 5 U. S. C. § 702 (1964 ed., Supp. IV), which provides:

"A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

[7] 28 U. S. C. § 1361 provides:

"The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

District Court had jurisdiction to review the action of the Regional Solicitor, Dorita High Horse contended that neither the Administrative Procedure Act nor 28 U. S. C. § 1361 allowed judicial review.

The District Court held that while there was some question as to whether jurisdiction existed under the Administrative Procedure Act, 28 U. S. C. § 1361 did provide a basis for jurisdiction, "in order to effectuate the purposes of the Administrative Procedure Act by providing the review function which the act contemplates."[8] 277 F. Supp. 464, 465 n. 1. The court then reasoned that, unlike § 1 of the Act of June 25, 1910, 36 Stat. 855, 25 U. S. C. § 372,[9] § 2, 36 Stat. 856, as amended by the Act of February 14, 1913, 37 Stat. 678, 25 U. S. C. § 373, contains no language conferring unreviewable finality upon a decision of the Secretary approving or disapproving an Indian's will. The District Judge concluded that the Administrative Procedure Act, 5 U. S. C. § 701 (1964 ed., Supp. IV), does not preclude judicial review of the Regional Solicitor's action. On the merits he held that Congress had conferred upon adult Indians

[8] We express no opinion as to the correctness of this determination. The complaint alleged that the amount in dispute was in excess of $10,000, exclusive of interest and costs, and that the dispute arose under the laws of the United States. Independent of the District Court's ruling, it had jurisdiction over the complaint under 28 U. S. C. § 1331. Cf. *Machinists* v. *Central Airlines*, 372 U. S. 682, 685 n. 2 (1963); *AFL* v. *Watson*, 327 U. S. 582, 589–591 (1946).

[9] That section provides in pertinent part:

"When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, *and his decision thereon shall be final and conclusive*. . . ." (Emphasis added.)

the right to make a will, limited only by the requirement that it be approved by the Secretary.

The District Court held that the review powers of the Secretary are not so broad as to defeat a plainly expressed and rationally based distribution by one who possessed testamentary capacity. The court concluded that the Regional Solicitor incorrectly viewed the Secretary's powers as authorizing disapproval of any will thought unwise or inequitable, and stated "Congress has conferred the right to make a will upon the Indian and not upon the Secretary. The Secretary can no more use his approval powers to substitute his will for that of the Indian than he can dictate its terms." 277 F. Supp., at 468. The case was remanded to the Secretary with directions to approve the will and distribute the estate in accordance with its provisions.

On appeal the Court of Appeals for the Tenth Circuit reversed the District Court, holding that the Secretary's action under 25 U. S. C. § 373 was unreviewable.[10]

Two basic questions are presented here: First, whether the Secretary's action is subject to judicial review; and second, if judicial review is available, whether on this record the Secretary's decision on the validity of the will was within the scope of authority vested in him under 25 U. S. C. § 373.

I

The Administrative Procedure Act contemplates judicial review of agency action "except to the extent that—(1) statutes preclude judicial review; or (2) agency ac-

[10] There is a conflict in the circuits on this point. Compare *Hayes* v. *Seaton*, 106 U. S. App. D. C. 126, 128, 270 F. 2d 319, 321 (1959); *Homovich* v. *Chapman*, 89 U. S. App. D. C. 150, 153, 191 F. 2d 761, 764 (1951), with *Heffelman* v. *Udall*, 378 F. 2d 109 (C. A. 10th Cir.), cert. denied, 389 U. S. 926 (1967); *Attocknie* v. *Udall*, 390 F. 2d 636 (C. A. 10th Cir.), cert. denied, 393 U. S. 833 (1968).

tion is committed to agency discretion by law. . . ." 5 U. S. C. § 701 (1964 ed., Supp. IV). Earlier in this Term in *City of Chicago* v. *United States*, 396 U. S. 162, 164 (1969), relying on *Abbott Laboratories* v. *Gardner*, 387 U. S. 136, 140 (1967), we noted that "we start with the presumption that aggrieved persons may obtain review of administrative decisions unless there is 'persuasive reason to believe' that Congress had no such purpose." [11] Section 2 of the Act of 1910 contains no language displaying a congressional intention to make unreviewable the Secretary's approval or disapproval of an Indian's will.

The respondents argue that we should follow the course taken by the Court of Appeals, reading into § 2 the language of the first section of the 1910 Act, which declares that the Secretary's decisions ascertaining the legal heirs of deceased Indians are "final and conclusive." Cf. *First Moon* v. *White Tail*, 270 U. S. 243, 244 (1926). The respondents contend that §§ 1 and 2 of the 1910 Act must be read *in pari materia* because both deal with the Secretary's power over the devolution of lands held in trust by the United States and both vest in the Secretary broad managerial and supervisory power over allotted lands.

We find this unpersuasive. First, while § 1 of the 1910 Act applies only to Indians possessed of allotments, § 2, as amended in 1913, also applies to all Indians having individual Indian monies or other properties held in trust by the United States. Thus, the coverage of these sections is not identical. Second, the 1910 Act is composed of some 33 sections, virtually all of which deal with the Secretary's managerial and supervisory powers over Indian lands. Many of these provisions vest in the

---

[11] See also *Association of Data Processing Service Organizations* v. *Camp*, 397 U. S. 150 (1970); *Barlow* v. *Collins*, 397 U. S. 159 (1970).

Secretary discretionary authority. For example, § 3 of the Act permits transfers of beneficial ownership of allotments by providing that allottees can relinquish allotments to their unallotted children if the Secretary "in his discretion" approves. 25 U. S. C. § 408. Yet neither this section nor any of the others in the enactment contains language cloaking the Secretary's actions with immunity from judicial review. If the respondents' position were accepted and we implied the finality language of § 1 into § 2, it would be difficult to justify on a reading of the statute a later refusal to extend the "final and conclusive" clause to other sections, such as § 3. Congress quite plainly stated that the Secretary's action under § 1 was not to be subject to judicial scrutiny. Similar language in § 2 would have made clear that Congress desired to work a like result under that section. Cf. *City of Chicago* v. *United States, supra.*

## II

The Regional Solicitor accepted the findings and conclusions of the Examiner of Inheritance that the testator had testamentary capacity when he executed the instrument, that he was not unduly influenced in its execution, and that it was executed in compliance with the prescribed formalities. This removes from the case before us all questions except the scope of the Secretary's power to grant or withhold approval of the instrument under 25 U. S. C. § 373.

The Regional Solicitor's view of the scope of the Secretary's power is reflected in his statement:

> "When a purported will is submitted for approval and it has been determined that it meets the technical requirements for a valid will, further consideration must be given before approving or disapproving it to determine whether approval will most nearly achieve *just and equitable treatment of the bene-*